

REGULATORY AUTHORITY
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EXECUTIVE SECRETARY

BELLSOUTH

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Nashville, Tennessee 37201-3300

Guy M. Hicks
General Counsel

March 30, 2000

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and NOW Communications, Inc. Pursuant to the Telecommunications Act of 1996*
Docket No. 00-00141

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Response to NOW Communications' Motion to Dismiss. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

POSTED
3-30-00

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

In re:)
)
Petition for Arbitration of the Interconnection)
Agreement Between BellSouth Telecommunications,) Docket No. 00-00141
Inc. and NOW Communications, Inc. Pursuant)
to the Telecommunications Act of 1996.)
_____)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO NOW
COMMUNICATIONS, INC.'S MOTION TO DISMISS**

COMES NOW BellSouth Telecommunications, Inc. ("BellSouth") and responds to the Motion to Dismiss filed by NOW Communications, Inc. ("NOW"). In response, BellSouth states as follows:

INTRODUCTION

On March 16, 2000, Now filed its Motion to Dismiss the Petition for Arbitration of a new Resale Agreement ("Petition") filed by BellSouth on February 25, 2000. As a basis for seeking dismissal of BellSouth's Petition, NOW argues two grounds: (1) that BellSouth failed to comply with Section 251(b)(1) of the Telecommunications Act of 1996 (the "1996 Act") regarding the timely filing of a Petition for Arbitration and (2) that BellSouth failed to comply with Section 252(b) of the 1996 Act regarding providing copies of the Petition and relevant documentation to the other party. NOW is wrong on both points. As explained more fully below, BellSouth has complied fully with the requirements of the 1996 Act. Thus, NOW's Motion to Dismiss should be denied.

ARGUMENT

A. The Arbitration “window” under Section 252(b)(1) of the 1996 Act

NOW contends that BellSouth failed to comply with the filing requirements contained in Section 252(b)(1) of the 1996 Act. Specifically, NOW argues that Section 252(b)(1) mandates the statutory “window” for filing a petition for arbitration and that “the statutory mandate is jurisdictional and cannot be amended, agreed, extended or waived.” (Motion to Dismiss at 2). Consequently, NOW argues that the Tennessee Regulatory Authority (“Authority”) “lacks jurisdiction to hear the BellSouth Petition.” (*Id.*). While BellSouth does not dispute that the statutory timeframes for arbitration under the 1996 Act are jurisdictional; as will be shown below, BellSouth has fully complied with the statutory “arbitration window” by filing its Petition for Arbitration on February 25, 2000, under the facts and circumstances of this matter.

The existing Resale Agreement between the parties was for a two-year term beginning on June 1, 1997. BellSouth corresponded with NOW as early as October 2, 1998, regarding a new resale agreement and the possibility of the parties amending their current agreement to reflect the recovery of charges for BellSouth’s provision of access to NOW to BellSouth’s operations support systems (“OSS”). Ultimately, BellSouth sent a formal request to renegotiate the parties’ existing resale agreement to NOW on August 20, 1999. Despite BellSouth’s efforts to negotiate with NOW toward a new resale agreement no new agreement was reached. The statutory window for the filing of a petition for arbitration by either party, based upon the first date requesting negotiations under Section 252(b)(1) of the 1996 Act, began on January 2, 2000, which was the 135th day, and ended on January 27, 2000, which was the 160th day.

As is reflected in the Petition for Arbitration, as the statutory deadline approached, NOW sent BellSouth a written request to extend the time for the parties to continue negotiating.

NOW's letter was sent on January 21, 2000, just six (6) days before the arbitration window was set to close. NOW expressly noted that the time for filing a petition for arbitration would expire on January 27, 2000. NOW then stated in its letter that "[w]e respectfully request your concurrence to extend the window [for filing for arbitration] for 30 days. We are looking toward moving from a resale agreement to a facilities-based agreement with provisions for UNE combinations pursuant to the FCC 319 Order." (NOW's letter of January 21, 2000 is attached to the Petition as Exhibit "D"). In light of this request from NOW, BellSouth sent a letter dated January 26, 2000 to NOW in which BellSouth acknowledged that it would agree to extend the time for the parties to negotiate a new agreement. (BellSouth's letter of January 26, 2000 is attached to the Petition as Exhibit "E").

BellSouth's and NOW's agreement to extend the time for negotiations was not, as NOW apparently contends, an agreement to alter the arbitration timelines found in Section 252(b)(1), but rather was an agreement to alter the start date for the parties' negotiations which would trigger the statutory arbitration deadlines. Basically, the parties agreement to continue negotiating, which again was at NOW's express request, was to treat the date that the request for negotiations was sent as being thirty (30) days later. In other words, BellSouth's August 20, 1999 letter was being treated by the parties, certainly as far as BellSouth was concerned, as having been sent on September 19, 1999 so that the parties could continue their negotiations. This meant that the statutory arbitration window would close on February 25, 2000. Thus, BellSouth timely filed its Petition for Arbitration by filing the Petition on February 25, 2000.¹

Not only did NOW request an additional thirty (30) day extension of time to negotiate in January, 2000, NOW also requested a second extension of the time to negotiate in February,

2000, again just days prior to the deadline for filing the petition. BellSouth declined this time since it was apparent that the parties were not going to be able to reach a new agreement through the negotiation process. (Copies of the parties' correspondence regarding this second request for extension of the time to negotiate are attached to the Petition as Exhibits "F" and "G").

Section 252(b)(1) states as follows:

(b) Agreements Arrived at Through Compulsory Arbitration.

(1) Arbitration—During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

The Telecommunications Act of 1996 was passed, among other reasons, to remove any restrictions on competition in the telecommunications market, including the local exchange market. Although a request for arbitration must be made within the 135 and 160-day timeframe established by Congress; these statutory timeframes must be placed in context. The Federal Communications Commission ("FCC") has stated that "[t]he legislative history thus indicates that Congress was concerned about parties filing too early and not giving informal negotiations a chance to succeed. Requiring parties to adhere to the statutory deadlines in section 252, therefore is consistent with that concern, as expressed in the statute and the legislative history." The FCC held that the failure to adhere to the statutory timeframe for requesting arbitration in Section 252(b)(1) does not warrant dismissal of the arbitration petition; rather it only excuses the state commission from completing the arbitration within nine months as required by Section 252(b)(4)((C). See *In re: Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 13 FCC Rcd 871, DA 98-85, ¶s 10-11

¹ As BellSouth's Petition for Arbitration clearly reflects, "BellSouth's Petition is filed with the Commission between the 135th and 160th day from the date that the negotiations were deemed to have commenced." (Petition for Arbitration at ¶ 12) (emphasis added).

(Jan. 22, 1998) (because party filed arbitration petition before the 135th day, state commission was “not bound by section 252 to complete the arbitration process within nine months of [the request for negotiation]”). (copy of the FCC’s decision is attached to this Response as Exhibit “1”). In keeping with Congress’ intent in passing the 1996 Act in general and Section 252(b)(1) in specific, the parties can agree to the effective date that the parties’ negotiations started which in turn affects the time that the “arbitration window” starts and ends, which is exactly what happened here. Such an interpretation is consistent with Congress’ preference for voluntary negotiations. In fact, to narrowly construe the parties’ agreement here as to when the time for negotiations starts and ends would have a chilling effect on future negotiations. The Authority should allow the parties to negotiate fully and completely when they have mutually agreed to do so in an attempt to avoid arbitration. Such a conclusion is in the public interest in that it encourages continued negotiations between the parties in lieu of arbitration.

The California Public Service Commission recently issued a decision involving the negotiation of an interconnection agreement that may shed some light on the present situation. *In re: Petition by Pacific Bell for Arbitration of an Interconnection Agreement with Pac-West Telecom, Inc.*, 1999 Cal. PUC LEXIS 70 (Cal. Public Utilities Comm’n Feb. 4, 1999) (copy of the California Commission’s decision is attached hereto as Exhibit “2”). In that case, Pacific Bell, the incumbent, sent a letter to Pac-West indicating its desire “to begin negotiations for a new Interconnection Agreement.” Pac-West responded, stating that it was willing to enter into negotiations and requesting certain information from Pacific Bell. The parties subsequently agreed to a time-frame for concluding the negotiations of a new agreement from the date of Pac-West’s response.

When those negotiations were unsuccessful, Pacific Bell filed a petition for arbitration with the California Commission. Pac-West filed a motion to dismiss, contending that, before a petition for arbitration is made, the Act requires that a request for renegotiation must be received by the incumbent. Because Pacific Bell asked to renegotiate the existing interconnection agreement, Pac-West asserted that no such request was made of Pacific Bell and, therefore, Pacific could not seek arbitration. 1999 Cal. PUC LEXIS 70, *4.

The California Commission rejected this argument and denied Pac-West's motion to dismiss. While acknowledging that Pacific had invited Pac-West to the negotiation table, the Commission noted that "both parties through their action assented to considering Pac-West's reply letter to Pacific as the *de facto* bona fide request for negotiation to begin interconnection negotiation." The Commission concluded that Pac-West had willingly participated in the negotiation process, voluntarily agreed to timeframes for the negotiations, and never gave any indication that it was not going to negotiate a new agreement with Pacific. Under these circumstances, the California Commission held that the requirements of Section 252(b)(1) had been satisfied.

Similarly, at no time during the negotiations, which NOW voluntarily participated in, did NOW suggest that it objected to extending the date by which the arbitration petition must be filed. To the contrary, NOW is the party that requested BellSouth to delay filing for arbitration so that the parties could have further opportunity to negotiate between themselves toward a new agreement. But for NOW's request for additional time to negotiate, which BellSouth consented to in good faith, BellSouth would have filed the petition for arbitration prior to the original deadline of January 27, 2000. The Commission should encourage the re-negotiation of existing

agreements, thus NOW's attempts at obstructionism should be rejected. To do otherwise would penalize BellSouth for acting in good faith during negotiations toward a new resale agreement.

B. The provision of copies of the Petition and relevant documentation under Section 252(b) of the 1996 Act

NOW also complains in its Motion to Dismiss that BellSouth failed to comply with the statutory provision for properly providing a copy of the Petition and any documentation to the other party, citing to Section 252(b). (Motion at p. 2). NOW did not provide any further explanation for this allegation. As the Petition for Arbitration clearly reflects, BellSouth attached numerous exhibits containing the relevant documentation to this arbitration, including a "red-lined" version of the draft resale agreement that the parties had been negotiating. Additionally, as BellSouth's Certificate of Service clearly indicates, BellSouth served a copy of the Petition with the exhibits attached thereto upon at least two representatives of NOW on the same day that BellSouth filed the Petition with the Authority. One such person was Mr. Larry Seab, NOW's President and CEO and the individual who acted as NOW's primary negotiator. The second person was NOW's legal counsel, Mr. Carrol H. Ingram, who also participated in the parties' negotiations. Based upon the foregoing facts which clearly demonstrate BellSouth's compliance with the requirements of Section 252(b), BellSouth respectfully requests that the Authority deny NOW's Motion to Dismiss.

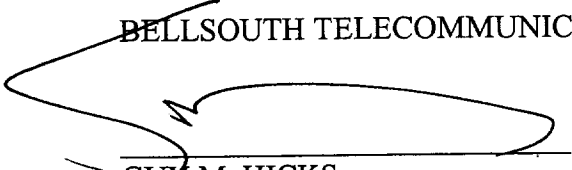
CONCLUSION

WHEREFORE, for the reasons set forth above, BellSouth respectfully requests that the Authority deny NOW's Motion to Dismiss and allow this matter to proceed to Arbitration in

order that the parties may enter into a new Resale Agreement. BellSouth further requests such other, more general or specific relief as is just and proper under the circumstances.

Respectfully submitted this ^{30th}~~28th~~ day of March, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☒ Hand
- ☐ Mail
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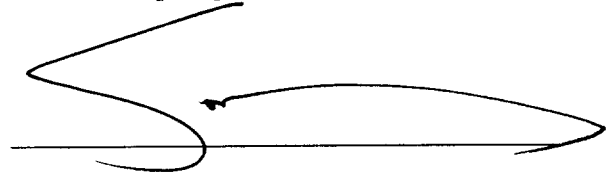
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R. Scott Seab
NOW Communications, Inc.
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A large, stylized handwritten signature in black ink, appearing to be 'R. Scott Seab', written over a horizontal line.